

JOHN NEWKIRK ET AL.

IBLA 79-363

Decided August 27, 1979

Appeal from decision of the Oregon State Office, Bureau of Land Management holding certain mining claims void. OR MC 4873 through OR MC 4880; OR MC 4882 and OR MC 4883.

Affirmed.

1. Applications and Entries: Generally – Applications and Entries: Filing – Federal Land Policy and Management Act of 1976: Assessment Work – Mining Claims: Abandonment – Mining Claims: Assessment Work

Under the Federal Land Policy and Management Act of 1976, sec. 314, 43 U.S.C. § 1744 (1976), the owner of unpatented mining claims located in 1977 must file an affidavit of assessment work or a notice of intention to hold the claim prior to Dec. 31 of the following calendar year, 1978, or the claim will be conclusively deemed to have been abandoned. Where an appellant asserts on appeal that he timely mailed proof of labor to the Bureau of Land Management, but the documents are not received by that office, the documents cannot be considered as filed with that office unless and until they are received by it.

APPEARANCES: John Newkirk, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is from a decision dated April 6, 1979, by the Oregon State Office, Bureau of Land Management (BLM), holding certain 1/ mining claims void for failure to file either an annual assessment statement or a notice of intention to hold the claim, as required by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and the pertinent regulation, 43 CFR 3833.2-1.

All of the claims were located in November and December 1977.

43 U.S.C. § 1744(a)(1) and (2) (1976) of FLPMA and the pertinent regulation, 43 CFR 3833.2-1(b)(1) require that the owner of an unpatented mining claim located after October 21, 1976, shall, prior to December 31 of each year following the calendar year in which the claim was located, file with the State Office evidence of annual assessment work performed during the previous assessment year or a notice of intention to hold the mining claim. Failure to file the required instruments is deemed conclusively to constitute an abandonment of the mining claim. 43 U.S.C. § 1744(c), 43 CFR 3833.4(a). Since the claims were located in 1977, either evidence of assessment work or a notice of intention to hold the claims had to be filed prior to December 31, 1978.

Appellants assert on appeal that proof of labor forms were mailed to BLM, via the U.S. Post Office, Medford, Oregon, on October 2, 1978. However, there is no evidence of record to show that the proofs of labor were ever received by BLM. If appellant did in fact, mail the proofs of labor, and they were lost in the mail, he selected the means of delivery, and must bear the consequences of nondelivery. See Amanda Mining and Manufacturing Association, 42 IBLA (1979). The Department in discussing a similar contention, stated in H. P. Saunders, Jr., 59 I.D. 41, 42-3 (1945), as follows:

1/ The mining claims in issue and the corresponding serial numbers are as follows: Name of Claim Serial Number

Aztec Group #7	OR MC 4878
Red Hill #1	OR MC 4879
Red Hill #2	OR MC 4880
Fluorescent Minerals Lode	OR MC 4882
All Mineral Lode #1	OR MC 4883

"Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office and not send through the United States mails. * * * A paper is filed when it is delivered to the proper official and by him received and filed." United States v. Lombardo, 241 U.S. 73, 76 (1916); Poynor v. Commissioner of Internal Revenue, 81 F. (2d) 521, 522 (C.C.A. 5th, 1936); Weaver v. United States, 72 F. (2d) 20, 21 (C.C.A. 4th, 1934); Tyson v. United States, 76 F. (2d) 533, 534 (C.C.A. 4th, 1935); Wampler v. Snyder, 66 F. (2d) 195, 196 (App. D.C., 1933); Stebbins' Estate v. Helvering, 74 App. D.C. 21, 121 F. (2d) 892, 894 (1941); Creasy v. United States, 4 F. Supp. 175, 177-178 (D.C.W.D. Va., 1933). Even if, as claimed by Saunders, the letter, in the usual course of mails, should have reached the register at Las Cruces prior to the expiration of the lease, the fact nevertheless remains that the applications were not filed on time, for a paper is considered filed only at the time when it is actually delivered to and received by the office concerned, not when it could have reached that office in the regular course of the mails. Poynor v. Commissioner of Internal Revenue, *supra*; Weaver v. United States, *supra*. It is thus immaterial whether or not there was any unusual delay in the delivery of the letter and whether or not the post office was "negligent." It is likewise irrelevant whether or not the assignees knew that they could apply for a new lease; nor does any significance attach to the fact that the assignments were not approved prior to the expiration of the original lease. The failure to file application for a new lease prior to the expiration of the original lease precludes the exercise of a preference right under the act of July 29, 1942. (Cf. Catherine Mon, A. 23999, decided December 15, 1944, unreported.) [Footnotes omitted.]

Cf. Mar-Win Development Co., 20 IBLA 383 (1975). Accordingly, since the required documents were not filed, BLM properly declared the claims void. Bruce Parks, 42 IBLA 18 (1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur.

Newton Frishberg
Chief Administrative Judge

Douglas E. Henriques
Administrative Judge

